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In the Supreme Court of the United States

OCTOBER TERM, 1991

BOARD OF TRUSTEES OF THE PUBLIC EMPLOYEES'
RETIREMENT FUND OF THE STATE OF INDIANA,
PETITIONER

v.

LOUIS W. SULLIVAN,
SECRETARY OF HEALTH AND HUMAN SERVICES, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that the Secretary of Health and Human Services is not equitably estopped from recouping federal funds that petitioner obtained unlawfully.



TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	10

TABLE OF AUTHORITIES

Cases:

<i>Automobile Club v. Commissioner</i> , 353 U.S. 180 (1957)	9
<i>Federal Crop Ins. Corp. v. Merrill</i> , 332 U.S. 380 (1947)	6, 9
<i>Gibbons v. United States</i> , 75 U.S. (8 Wall.) 269 (1868)	8
<i>Hart v. United States</i> , 95 U.S. 316 (1877)	8
<i>Heckler v. Community Health Service, Inc.</i> , 467 U.S. 51 (1984)	8, 9
<i>INS v. Hibi</i> , 414 U.S. 5 (1973)	9
<i>INS v. Miranda</i> , 459 U.S. 14 (1982)	9
<i>Lee v. Munroe & Thornton</i> , 11 U.S. (7 Cranch) 366 (1813)	8
<i>Montana v. Kennedy</i> , 366 U.S. 308 (1961)	9
<i>OPM v. Richmond</i> , 110 S. Ct. 2465 (1990)	5-6, 7
<i>Pine River Logging Co. v. United States</i> , 186 U.S. 279 (1902)	8-9
<i>Schweiker v. Hansen</i> , 450 U.S. 785 (1981)	9
<i>Sutton v. United States</i> , 256 U.S. 575 (1921)	9
<i>United States v. Stewart</i> , 311 U.S. 60 (1940)	9
<i>Utah v. United States</i> , 284 U.S. 534 (1932)	9
<i>Utah Power & Light Co. v. United States</i> , 243 U.S. 389 (1917)	8
<i>Wilber Nat'l Bank v. United States</i> , 294 U.S. 120 (1935)	9

Constitution, statutes and rule:

U.S. Const. Art. I, § 9, Cl. 7	6
Federal Tort Claims Act, 28 U.S.C. 2680 (h)	6
42 U.S.C. 502	8
42 U.S.C. 502 (a)	2, 7, 8



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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 936 F.2d 988. The opinion of the district court (Pet. App. A9-A35) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1991. The petition for a writ of certiorari was filed on October 11, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Pursuant to 42 U.S.C. 502(a), the federal government pays the administrative costs that States incur in operating unemployment compensation programs, including the salaries and benefits of state employees. The regulations governing federal grant programs to the States, which are set out in General Services Administrative Circular 74-4, provide that allowable costs must "[b]e consistent with policies, regulations, and procedures that apply uniformly to both federally assisted and other activities of the unit of government of which the grantee is a part." Circular 74-4, Pt. C.1.d.; Pet. App. A6. Such a "rule of neutrality," Pet. App. A2, is necessary to ensure that the federal government pays only those costs "necessary for the proper and efficient administration" of an unemployment compensation program, as Section 502(a) requires.

The Indiana Employment Security Division (IESD) administers that State's unemployment compensation program. All state and municipal employees in Indiana, including employees of IESD, may participate in a defined benefit pension plan operated by petitioner, the Board of Trustees of the Public Employees' Retirement Fund of the State of Indiana. Petitioner maintains separate accounts for IESD and agencies financed by the State, and the accounts are supposed to be fully funded. However, in 1972 "the State contribution level to PERF [the Public Employees' Retirement Fund] * * * was at an artificially low level * * * because the State's appropriation was not in accordance with actuarially determined figures." Pet. App. A42. The IESD account was also underfunded in 1972 because, consistent with the rule of neutrality set out in Circular 74-4, "IESD contributed to PERF at the same rate as the other State agencies." *Ibid.*

Petitioner then began to treat IESD differently from the other state agencies by assessing IESD at higher rates in order to cure its underfunding in 15 years, whereas the other agencies were assessed at a rate that would eliminate underfunding after 30 years. "Disparity in assessment was only half of the story; the state legislature did not appropriate all the money PERF sought for state-funded agencies," so state "[a]ppropriations fell short of the amount required to eliminate the underfunding even within 30 years." Pet. App. A3. As a result, the contribution rates paid by the federal government (through IESD) and the State varied markedly between 1972 and 1978; for example, in 1973 IESD contributed 13.77% of its gross payroll to the plan, while the State otherwise contributed only 4.76% of its gross payroll. *Ibid.*

2. In 1982, auditors acting on behalf of the Secretary of Health and Human Services, who administers federal grant programs to the States, concluded that petitioner was not treating IESD the same as other state agencies. They therefore demanded that PERF refund the excess contributions that the federal government had made to PERF on behalf of IESD. PERF declined. The HHS Grant Appeals Board subsequently concluded that petitioner had "calculated federal and State contributions to PERF inconsistently" and "sustain[ed] the Agency's disallowance of \$6,025,681." Pet. App. A56; see *id.* at A41-A56.

In reaching that conclusion, the Board considered and rejected petitioner's argument that in a 1959 memorandum the federal government recognized that IESD should be treated differently than other state agencies. The memorandum did "agree with the position" set out in a 1945 letter that IESD's "liability

be calculated separately from all other units.” Pet. App. A45. But only by reading that statement “completely out of context,” the Board concluded, would it follow that the federal government agreed to pay higher rates than the State. *Id.* at A47. To the contrary, the memorandum made clear that IESD’s liability was to be calculated separately and then compared to that of other comparable participants in PERF to assure that “IESD’s contribution * * * was equal in amount to that of the other State departments.” *Id.* at A48. Indeed, the memorandum stated that it was “necessary to increase or decrease the funded portion of the [IESD] liability to the level of the other State departments.” *Ibid.*

3. Petitioner then brought this action, seeking a declaratory judgment that the Secretary could not recoup the excess payments. The district court agreed with the Grant Appeals Board, “[f]or the reasons set forth in the Grant Appeals Board’s decision,” that IESD was not a “separate legal entity” for purposes of Circular 74-4. Pet. App. A28. The court added “that both PERF and the 1959 memorandum upon which it so heavily relies refer to the IESD as a ‘state department.’” *Ibid.* The court next concluded that “[c]onsistent treatment was not given to IESD and the other state agencies.” *Id.* at A32.

The court then rejected petitioner’s contention that the federal government was equitably estopped, on account of the 1959 memorandum, from complaining about the inconsistent treatment. Equitable estoppel runs against the government, if at all, only upon a showing of “affirmative misconduct,” the court explained, and no such showing was made in this case. Pet. App. A34. In addition, the court pointed out, “[t]he 1959 memorandum does not say, as PERF contends, that HHS approves the use of different

treatment for IESD *vis-a-vis* the other state agencies." *Ibid.*

4. The court of appeals declined to decide what the 1959 memorandum meant. It instead recognized, after noting that "Indiana wants money from the Treasury [and] it invokes estoppel to prevent the federal government from reducing current payments in order to make up what HHS believes to have been overpayments in the 1970s," that this Court's decision in "*OPM v. Richmond*, 110 S. Ct. 2465, 2471-76 (1990), holds that courts may not alter statutory conditions for the drawing of public funds through the formula of estoppel." Pet. App. A4. Accordingly, the court held that estoppel would not lie against the government in this case.

The court of appeals went on to conclude that the Board did not err in determining that petitioner's disparate treatment of IESD was contrary to the rule of neutrality set out in Circular 74-4, Pet. App. A5-A8, a holding that petitioner does not challenge.

ARGUMENT

Petitioner contends that even though it violated the rule of neutrality by treating IESD differently from other state agencies, the federal government is estopped from recouping the excess payments petitioner obtained. There is no merit to petitioner's claim that estoppel may lie against the government in such circumstances. In any event, the Court would not need to reach that issue since, before holding for the first time that the government is estopped, the Court should consider whether the 1959 memorandum supports petitioner's position and conclude, like the Grant Appeals Board and the district court, that it does not.

1. The court of appeals rightly concluded that petitioner's estoppel claim is barred by *OPM v. Rich-*

mond, 110 S. Ct. 2465 (1990). In *Richmond*, a former employee of the Navy who retired with a disability annuity sought information from the government regarding how much money he could earn and still retain his annuity. He was given misinformation twice—once orally by a Navy representative and once in writing through an OPM circular. As a result of his reliance on the misinformation, the pensioner lost his annuity for a period of time. The Federal Circuit found all the elements of an estoppel present and held that the federal government was required to refund the annuity payments that had been withheld.

This Court reversed. The Court first reviewed its earlier holdings and observed that “‘not even the temptations of a hard case’” should provide a basis for a court order requiring recovery contrary to the terms of a statute or regulation. 110 S. Ct. at 2469, quoting *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 385-386 (1947) (government not estopped where a federal employee erroneously advised a farmer that he would be covered under the regulations governing the wheat insurance program). The Court then went on to hold that because the Appropriations Clause of the Constitution provides that “No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law,” Art. I, § 9, Cl. 7, the government can never be estopped in cases involving public funds. The Court held that “claims for estoppel cannot be entertained where public money is at stake.” 110 S. Ct. at 2473.

The Court in *Richmond* further observed that “[t]he provisions of the Federal Tort Claims Act * * * provide a strong indication of Congress’ general approach to claims based on governmental misconduct.” 110 S. Ct. at 2474. Noting that the FTCA excludes both negligent and intentional misrepresentation claims from its coverage, 28 U.S.C. 2680(h),

the Court recognized that claims seeking estoppel against the government are in practical effect claims for misrepresentation. "We would be most hesitant," the Court wrote, "to create a judicial doctrine of estoppel that would nullify a congressional decision against authorization of the same class of claims." *Ibid.*

The *Richmond* Court also rejected arguments that attempted to justify estoppel on public policy grounds. "It ignores reality," the Court wrote, "to expect that the Government will be able to 'secure perfect performance from its hundreds of thousands of employees scattered throughout the continent.' * * * To open the door to estoppel claims would only invite endless litigation over both real and imagined claims of misinformation by disgruntled citizens, imposing an unpredictable drain on the public fisc. Even if most claims were rejected in the end, the burden of defending such estoppel claims would itself be substantial." 110 S. Ct. at 2476. Finally, the Court stated that "[w]hether there are any extreme circumstances that might support estoppel in a case not involving payment from the Treasury is a matter we need not address." *Ibid.* The Court thus reiterated that in circumstances where public funds are at issue, there can *never* be an estoppel of the government.

Petitioner attempts to distinguish *Richmond* by arguing that "[t]he Appropriation Clause is not implicated because Congress directed the Secretary, through 42 U.S.C. § 502, to award grants for the proper and efficient administration of unemployment programs by the States." Pet. 11. This assertion is wrong. The payments authorized by Section 502(a) are conditioned on the Secretary's determination that such funds are necessary for the "proper and efficient administration" of the program. That determi-

nation, in turn, is controlled by Circular 74-4. As the court of appeals noted, "Indiana wants a greater sum than the Secretary believes necessary for 'proper' administration; to get it Indiana needs to address the legality of the Secretary's determination" that PERF had violated the conditions set forth in Circular 74-4. Pet. App. A4. Since all payments under Section 502 must be made in accordance with the provisions of Circular 74-4, the court of appeals was correct in holding that any order requiring payments contrary to the terms of Circular 74-4 would compel payments from the Treasury that Congress has not appropriated or otherwise authorized. Thus, *Richmond* fully applies to bar estoppel in this case.

Indeed, denial of petitioner's estoppel claim is compelled not only by *Richmond* but also by the many decisions of this Court that preceded it. This Court has repeatedly and consistently held that the federal government could not be equitably estopped from enforcing the public laws, even though private parties might suffer hardship as a result. For more than 150 years, the Court has ruled that the government is "neither bound nor estopped by acts of its officers or agents in entering into an arrangement or agreement to do or cause to be done what the law does not sanction or permit," *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917), and that "those who deal with the Government are expected to know the law and may not rely on the conduct of Government agents contrary to law." *Heckler v. Community Health Services, Inc.*, 467 U.S. 51, 63 (1984).^{*} In

^{*} See, e.g., *Lee v. Munroe & Thornton*, 11 U.S. (7 Cranch) 366 (1813); *Gibbons v. United States*, 75 U.S. (8 Wall.) 269, 274 (1868); *Hart v. United States*, 95 U.S. 316, 318-319 (1877); *Pine River Logging Co. v. United States*, 186 U.S.

fact, no decision of the Court squarely holds that equitable estoppel lies against the government in any circumstances.

2. Moreover, before holding for the first time that the federal government may be equitably estopped, the Court should consider whether there is a basis for estoppel under the facts of this case. There is not. Even though the court of appeals said that the 1959 memorandum could be read to support either petitioner's position or the federal government's position, Pet. App. A4, in our view the memorandum supports petitioner's position only if read "completely out of context," as the Grant Appeals Board concluded, *id.* at A457. At the least, as the district court noted, *id.* at A34, under no reading can the 1959 memorandum be interpreted as showing "affirmative misconduct," a prerequisite to a finding of equitable estoppel. Rather than relying on its interpretation of the 1959 memorandum, "[b]efore making a dramatic change in the way it assessed the pension contributions of the IESD in 1972, Indianapolis should have checked with Washington." *Id.* at A5. Thus, because proper analysis of the 1959 memorandum shows that even a private party in the government's position

279, 291 (1902); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 408-409 (1917); *Sutton v. United States*, 256 U.S. 575, 579 (1921); *Utah v. United States*, 284 U.S. 534, 545-546 (1932); *Wilber Nat'l Bank v. United States*, 294 U.S. 120, 123-124 (1935); *United States v. Stewart*, 311 U.S. 60, 70 (1940); *Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380 (1947); *Automobile Club v. Commissioner*, 353 U.S. 180, 183 (1957); *Montana v. Kennedy*, 366 U.S. 308, 314-315 (1961); *INS v. Hibi*, 414 U.S. 5, 8 (1973); *Schweiker v. Hansen*, 450 U.S. 785 (1981); *INS v. Miranda*, 459 U.S. 14 (1982); *Heckler v. Community Health Services, Inc.*, 467 U.S. 51 (1984).

would not be estopped by it, this Court would not need to reach the question presented in the petition even if certiorari were granted in this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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